No. 10,540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction.

This information was brought under Section 205(b) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. Appendix, Section 901, *et seq.* Jurisdiction of the District Court was invoked under Section 205(c) of that Act. The judgments from which this appeal is prosecuted were entered on August 30, 1943 [R. 17, 19]. Notice of appeal was filed on behalf of both defendants on September 3, 1943 [R. 22, 27], and appeals consolidated [R. 46]. This court has jurisdiction of the appeal by virtue of Section 129 of the Judicial Code, 36 Stat. 1134, 28 U. S. C. Sec. 227.

Statutes and Regulations Involved.

This case involves the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. Appendix Sec. 901, *et seq.*, as amended by the Act of Oct. 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, Sec. 961, hereinafter referred to as the "Act"; Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381); Revised Maximum Price Regulation No. 148 (7 Fed. Reg. 8609), and Rule II (4) of the United States Supreme Court Rules of Criminal Procedure, 18 U. S. C. A. Supp. Sec. 688.

The pertinent provisions of the Act [set forth in the Appendix] may be summarized as follows:

Sections 1(a), 2(a), 2(c), 2(d), 2(g) and 2(h) set forth standards which govern the Administrator's exercise of his authority to control prices.[1] Section 4(a) makes it unlawful to violate any maximum price regulation. Section 201(d) authorizes the Administrator to issue regulations deemed necessary or proper to carry out the purposes of the Act. Regulations governing the procedures for administrative review of price regulations are based on this provision and on Section 203(a).

Sections 203 and 204 provide an exclusive procedure for administrative and judicial review of price and rent regulations; Sec. 204(d) prohibits all courts, except the Emergency Court of Appeals and the Supreme Court of the United States, from passing upon the validity of the regulations in any enforcement suit, as in the present case.

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[1]While Section 2 is the source of the Administrator's power to issue maximum price and rent regulations, note should also be had of Section 206, pursuant to which certain price "schedules" issued prior to enactment of the statute are made "effective."

Section 205(b) provides criminal sanctions for wilful violations of the prohibitions contained in Section 4(a). Section 205(c) establishes jurisdiction for enforcement suits.

Section 301 requires the Administrator to make quarterly reports to Congress.

Sections 302(a) to 302(c), and 302(i) define certain terms appearing in the price provisions of the Act.

Section 305 supersedes conflicting prior statutes.

The Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App., Supp. II, Sec. 961, *et seq.*, amended the Emergency Price Control Act of 1942, and its pertinent parts are also set out in the Appendix. Section 1 authorizes and directs the President to stabilize prices, wages, and salaries so far as practicable on the basis of levels prevailing on September 15, 1942. Section 2 provides the authority to implement the Congressional command contained in Section 1. Section 3 revises the methods used in prescribing price ceilings on agricultural commodities. Section 3 further provides that processors of agricultural commodities shall be allowed a "generally fair and equitable margin" for such processing—the same criterion as contained in Section 2 of the original Act. Sections 4 and 5 relate to wage and salary controls. Section 6 provides that this Act and the Regulations issued under it shall terminate on June 30, 1944, and Section 7(a) extends the life of the Emergency Price Control Act to June 30, 1944. Section 7(b) makes all administrative, procedural, and punitive sanctions contained in the Emergency Price Control Act applicable to this Act, and Section 7(c) provides that this Act shall in no manner invalidate any provisions of the original Act except as specifically listed. Sections

8, 9 and 10 relate to provisions concerning agriculture and definitions. Section 11 provides criminal penalties.

Revised Maximum Price Regulation No. 169 was issued on December 10, 1942, under Section 2 of the Act (7 F. R. 10381) and became effective December 16, 1942. This regulation prescribes certain basic prices (called zone prices) for various grades of beef carcasses and wholesale cuts (Sec. 1364.452). From these basic prices certain deductions are required to be made (Sec. 1364.453), and certain additions are permitted (Sec. 1364.454). Sec. 1364.401 prohibits the sale of beef and veal carcasses and wholesale cuts at prices higher than those permitted by the regulation, and Sec. 1364.406 prohibits evasion of the provisions of the Regulation. Grading is specifically required (Sec. 1364.411) and records and reports are required to be kept (Sec. 1364.407).

Revised Maximum Price Regulation No. 148 was issued under Section 2 of the Act (7 F. R. 8609) and became effective November 2, 1942. This regulation covers dressed hogs and wholesale pork cuts. Zone price ceilings were established (Sec. 1364.22) from which certain deductions are required to be made, and certain additions are permitted (Sec. 1364.35). Sec. 1364.21 prohibits the sale of dressed hogs and wholesale pork cuts at prices over the permitted maximum. Records are required to be kept (Sec. 1364.27) and evasion prohibited (Sec. 1364.26).

Rule II(4) of the Rules of Criminal Procedure promulgated by the Supreme Court (18 U. S. C. A. Supp. Sec. 688) requires that a motion to withdraw a plea of guilty "shall be made within 10 days after entry of such plea and before sentence is imposed."

Additional Statement of the Case.

This is an appeal from judgments of conviction [R. 17, 19] entered by the United States District Court for the Southern District of California, Central Division, on defendants' pleas of guilty [R. 15, 56] of criminal violations of the Act. The information was filed on July 15, 1943 [R. 2]. It charges Aron Rosensweig and Abe Rosensweig individually with wilfully selling processed meats at prices higher than those permitted by Revised Maximum Price Regulations No. 169 and 148 [R. 3-14]. The information alleges the issuance of Revised Maximum Price Regulations No. 169 (7 F. R. 10381) and 148 (7 F. R. 8609.) It contains six counts, with counts 1-5 detailing violations of Revised Maximum Price Regulation No. 169, and count 6 charging violations of Revised Maximum Price Regulation No. 148. Count 1 charges the sale of a wholesale cut of beef at a price substantially in excess of that prescribed by the Regulations. Counts 2-6 detail the sales of meats in excess of the established ceiling prices through the practice of entering the ceiling price on the invoice slip, and then demanding and receiving a "side payment" in excess of the ceiling price. All of the sales contained in the information were alleged to have occurred from April 24, 1943 to May 25, 1943.

Defendants filed a demurrer [R. 11-13] and motion to quash [R. 54-56], to the information.[2] These motions attacked the Act and Regulations No. 169 and 148 as unconstitutional and invalid [R. 11-12, 52-56]. On August 2, 1943, the motions were overruled by the District

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[2]Defendant Abe Rosensweig filed a separate plea in abatement which was overruled [R. 56].

Court [R. 14, 56], and pleas of not guilty were entered to all counts of the information.

On August 11, defendants changed their pleas to one of guilty to counts 1 and 3 of the information [R. 15, 56], and counts 2, 4, 5 and 6 were subsequently dismissed [R. 15.] The case was then referred to the Probation Officer.

The hearing on the Probation Officer's report was held on August 30, 1943. The court stated that the offenses were deliberate and planned violations of the law [R. 60], and sentenced Aron Rosensweig to imprisonment for 30 days, and imposed a fine of $1,000 [R. 17, 61]. Abe Rosensweig was fined $1,000 but further sentence was suspended for a period of two years, on condition that he should not wilfully violate any provisions of price regulations issued under authority of the Act [R. 19, 61]. Attorney for defendants objected to the imposition of the jail sentence [R. 62], and detailed an alleged understanding with the United States Attorney's Office concerning the amount of the fines which were to be recommended to the court by the Probation Officer [R. 61].[3] The Assistant United States Attorney categorically denied that any such commitment had been made [R. 62.] The court refused to modify the judgment stating that it was the duty of the court to impose the punishment, and that this discretion could not be fettered by agreements of counsel [R. 62].

Defendants filed a motion to vacate the judgments, to withdraw their pleas of guilty and reenter their pleas of

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[3]A full treatment concerning this alleged understanding which defendants assert existed between defendants' attorneys, the United States Attorney's Office and the Probation Officer is treated fully in Point III of this brief *infra* at page .....

not guilty and for a new trial [R. 64,65]. Affidavits were filed by both parties [R. 63-72]. This motion was denied [R. 21] on the court's finding that defendants had not been deprived of any legal rights [R. 102-3].

On September 3, 1943, defendants filed notices of appeal [R. 22, 27]; and the appeals were ordered consolidated [R. 46].

Summary of Argument.

Defendants, by their specifications of error (Defendants' Brief, pp. 2-3) have raised three issues on this appeal: (1) the validity of Revised Maximum Price Regulations No. 169 and 148; (2) the validity of the Act, on the ground that it illegally delegates legislative powers to the Administrator in violation of Article 1, Section 1 of the Constitution: and (3) whether the District Court abused its discretion in refusing to vacate the judgment and refusing to permit defendants to withdraw their pleas of guilty and reenter their pleas of not guilty, and in refusing to grant a new trial.

All of these questions were decided adversely to defendants by the lower court. The ruling was clearly right, because:

(1) Defendants' objections addressed to the validity of the Regulations may not under the express provisions of Section 204(d) of the Act be considered by any court other than the Emergency Court of Appeals and the United States Supreme Court on certiorari. This section is clearly constitutional, and has been given full effect by federal courts. In this regard, defendants' assertion that Maximum Price Regulations No. 169 and 148 are invalid because they were not approved by the Secretary of Agriculture as provided by the Act, though barred from con-

sideration by Section 204(d), is in any event without merit. The Act only requires approval of ceilings placed on "agricultural commodities" and since the Revised Maximum Price Regulations here involved govern only meats processed from agricultural commodities, the requirement that the Secretary of Agriculture approve ceilings placed on "agricultural commodities" is patently inapplicable.

(2) Defendants' contention that the Act unlawfully delegates legislative power to the Administrator is without merit. The Act is well within the permitted constitutional limits both in respect to statement of legislature policy and in establishment of standards for the Administrator. Moreover, like the validity of the exclusive jurisdiction provisions of the Act, this question is no longer a novel one in the federal courts, for the decided cases have unanimously upheld the delegation of authority to the Administrator contained in the Act to control prices.

(3) Defendants' argument that the Trial Court abused its discretion in denying their motions to vacate the judgments, to withdraw pleas of guilty and reenter pleas of not guilty and for a new trial, is without merit on two grounds: (a) The motions were not in the nature of a writ of error *coram nobis* and therefore were not timely under Rule II(4) of the Supreme Court Rules of Criminal Procedure; and (b) in any event, the uncontested facts demonstrated that defendants were not deprived of any legal rights by certain alleged understandings with the Probation Officer and the United States Attorney's Office, and that in denying defendants' motions the court did not abuse its discretion, but on the contrary, meted out the only sentence which should have been imposed on these defendants.

ARGUMENT.

I.

Section 204(d) of the Emergency Price Control Act Constitutionally Precludes This Court From Considering the Validity of the Maximum Price Regulations Here Involved.

The defendants in Point I of their brief (Defendants' Brief p. 5) attack Maximum Price Regulations No. 169 and 148 as unconstitutional and invalid. Specifically, defendants state that the regulations were not approved by the War Food Administrator as required by the Emergency Price Control Act, and Executive Order No. 9328. Defendants also urge that the regulations are unconstitutional and invalid because they deprive defendants of liberty and property without due process of law, and also that the basic Act upon which these regulations depend for vitality is unconstitutional, and that therefore these regulations necessarily fall with it. However, by the express provisions of Section 204(d) of the Emergency Price Control Act this court has been deprived of jurisdiction to consider the attacks made by defendants upon the validity of the regulations.[4]

Section 204(d) of the Act provides as follows:

> *"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have ex-*

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[4]Defendants' assertion that the regulations deprive them of property without due process of law (Defendants' Brief at page 9) consists only of a bare allegation, without any attempt to show in what manner or in what way the regulations unlawfully deprive them of property. Therefore, apart from Section 204(d) of the Act, defendants may not ask this court to consider this constitutional question, because it is axiomatic that federal courts will not pass upon grave constitutional questions "hypothetically" where no specific injury has been shown. See *Liverpool, N. Y. and Philadelphia SS. Co. v. Commissioners of Immigration*, 113 U. S. 33, 36 (1885); and *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 354 (1937).

clusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206, and of any provision of any such regulation, order, or price schedule. *Except as provided in this section, no court—Federal, State or Territorial—shall have jurisdiction or power to consider the validity of any such regulation,* order or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, or price schedule, or to restrain or enjoin the enforcement of any such provision." (Emphasis added.)

Section 204(d) is the keystone of the plan established in Sections 203 and 204 of the Act for administrative reconsideration and judicial review of maximum price and rent regulation issued under the authority of Section 2 of the Act (or effective in accordance with Section 206). The statute affords to aggrieved persons subject to a regulation a comprehensive plan of administrative and judicial review. The statute and procedural regulations issued thereunder accord two types of administrative relief to petitioners: (1) a "protest" against the Regulations or any provision thereof (Act, Sec. 203; Procedural Regulation No. 1, subpart (d)); and (2) a "petition for amendment" of the regulations or any provision thereof (Procedural Regulation No. 1, subpart (c)), the latter being an additional remedy offered by the Administrator and not required by the Act. addressed to the Administrator's "legislative" discretion. See *Bogart Packing Company v. Brown.* 138 F. (2d) 422 (Emerg. Ct. of App., 1943).

The statutory "protest" is required to be filed within 60 days from the date of issuance of the regulation complained of, or may be filed upon "new grounds" within 60 days from the date when the protestant had or might reasonably have had notice of such new grounds (Act, Sec. 203(a)). If the Administrator denies the protest in whole or in part, any aggrieved person is given the right of appeal to a special court created by the Act—the Emergency Court of Appeals.[5] The jurisdiction of this court attaches upon the filing of a complaint (Section 204(a) and (c)). This court will have before it the entire administrative record made before the Administrator and all economic data considered by him. The court is vested with full authority to set aside any regulation or order which is shown to be "not in accordance with law or * * * to be arbitrary or capricious" (Section 204(b)). The court also possesses power, of course, to pass upon any proper challenge to the constitutionality of the Act itself. See *Lockerty v. Phillips,* 319 U. S. 182 (1943). The plan of administrative and judicial review established in Sections 203 and 204 of the Act has been held, in its various aspects, to fully meet the requirements of due process. See *Lockerty v. Phillips,* 319 U. S. 182 (1943); *Avant v. Bowles,* Emergency Court of Appeals, December 31, 1943, not yet reported; *Taylor v. Brown,* 137 F. (2d) 654 (Emergency Court of Appeals, 1943); cert. denied Nov. 15, 1943; *Montgomery Ward & Co. v.*

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[5]The members of this court are designated by the Chief Justice of the United States from judges of the United States District Courts and Circuit Courts of Appeals. The Judges of the Emergency Court of Appeals are Calvert Magruder (1 Cir.), Albert B. Maris (3 Cir.), and Bolitha J. Laws (D. C., Dist. of Columbia). The Emergency Court of Appeals may sit in "such places as it may specify" (Section 204(c) of the Act). The Court has held sessions in New York, Philadelphia, Chicago, Boston, Cincinnati, Seattle, and Atlanta.

Bowles, 138 F. (2d) 669 (ECA, 1943); *Lakemore Co. v. Brown,* 137 F. (2d) 355 (ECA, 1943); and *Henderson v. Kimmel,* 47 F. Supp. 635 (D. C. Kans. 1942). The judgments of the Emergency Court of Appeals are reviewable by the United States Supreme Court on certiorari.

The considerations which impelled Congress to provide for exclusive jurisdiction to review regulations issued under authority of the Emergency Price Control Act were well summarized by the Court of Appeals for the First Circuit in the case of *Rottenberg v. U. S.,* 137 F. (2d) 850 (1st Cir., 1943, *certiorari* granted without opposition November 8, 1943). The court called attention to the need for avoiding the disruptions in continuity of control which would result from a particular court's holding a regulation invalid, saying: "All that a court could do would be to strike down; it could not draft and put in force a substitute regulation . . . If some commodities . . . (were) released from price control, even temporarily, the consequences might well be irretrievable, and, our economy being all of a piece, pressures would develop upon other commodities to break through their ceiling" (pp. 856, 857); to the need for avoiding too great a burden upon the experts charged with administering the program, saying: "If in every proceeding, civil or criminal, to enforce compliance with the regulations, the Administrator had to present the mass of economic data which might be required to establish the validity of the regulation, and to try the issue *de novo* as against each defendant, his predominant occupation would become fighting litigation rather than fighting inflation" (p. 857); and the need for channeling of judicial review through the Emergency Court, as described in the report of the Senate

Committee on Banking and Currency (Sen. Rep. No. 931, 77th Cong., 2d Sess., page 7) "in order to avoid the confusion which would result from conflicting decisions in different circuit courts on the same regulations. It will also permit the expeditious consideration and disposition of problems arising under the statute by a court familiar with its provisions and operations" (p. 855).

The above designated sections of the Act thus prescribe a procedure for the full consideration of the complicated economic and factual problems presented by a challenge to the validity of the Regulations, with full judicial review in a tribunal which has become expert in dealing with such questions and whose judgments are uniform throughout the land.

As a corollary to this scheme of review, limitations are placed upon the jurisdiction of all other courts, and the limitations here involved is as follows (Sec. 204(d)):

> "Except as otherwise provided in this Section, *no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any* * * * *regulation* issued under section 2 of the Act * * *" (Empasis supplied.)

The defendant in an enforcement proceeding under Section 205 of the Act, as in the instant case, is thus free to raise all proper defenses addressed to the constitutionality of the *Act* itself as distinguished from the regulations involved. The defendant may not however raise any defense addressed to the validity of the Regulation.[6]

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[6]The Senate Committee on Banking and Currency, in favorably reporting out the present Section 204(d) stated (S. Rep. No. 931, 77th Cong., 2d Sess., p. 25): "Thus, the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under Section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction concurrent with the Emergency Court, to determine the constitutional validity of the statute itself."

The defendants in the present action have attacked the regulations on two grounds. Defendants state that the Regulations here involved have not been enacted in conformity with the Emergency Price Control Act, and are unconstitutional as depriving defendants of property without due process of law. However, as we have shown, Section 204(d) precludes consideration of the validity of these regulations. Defendants dispute the constitutionality of the regulations as well as the lack of statutory authority for the regulations. Both types of invalidity are covered by Section 204(d). In reporting out Section 204(d) the Senate Committee on Banking and Currency stated (S. Rep. No. 931, 77th Cong., 2 Sess., p. 24):

> "Section 204(d) further provides expressly that no court other than the Emergency Court of Appeals and the Supreme Court shall have jurisdiction or power to consider the *validity, constitutional or otherwise,* of any regulation or order issued under Section 2." (Emphasis supplied.)

This clear legislative intent has been given effect many times in cases arising under the Act. See *Henderson v. Burd,* 133 F. (2d) 515 (2 Cir., 1943); *Brown v. Oklahoma Operating Co.* (W. D. Okla., 1943), OPA Service 620:128; *Brown v. Liniavski et al.* (S. D. N. Y., 1943), OPA Service 620:308; and *Brown v. W. T. Grant Co.; Brown v. Newberry Co.; Brown v. J. C. Penny Co.,* and *Brown v. McCrory Stores* (S. D. N. Y., 1943), OPA Service 620.312. These cases hold that all courts other than the Emergency Court of Appeals are precluded by the provisions of Section 204(d) of the Act from considering the constitutional and statutory validity of any regulation issued under authority of the Act, and that

relief lies solely in the administrative and judicial review accorded defendants by Sections 203 and 204 of the Act.

All courts which have considered the question have held that the Emergency Court of Appeals has exclusive jurisdiction to consider both constitutional and statutory validity of regulations issued under the Act. Such holdings are eminently sound, for the disruptions which would result to the price control program by permitting decisions and possible conflict of decisions, as to statutory invalidity of regulations in the various state and federal judicial districts throughout the country, would be no less injurious to the war effort than the confusion caused by decisions which reach the same result on grounds of "unreasonableness" of regulations. It is therefore submitted that Section 204(d) of the Act prevents the consideration by this court of both the question of whether the regulation deprived defendants of property without due process of law, and of whether the regulation is invalid because it has not been approved by the Secretary of Agriculture or the War Food Administrator which defendants claim is required by the Act.

Defendants have not directly attacked the validity of the exclusive jurisdiction provisions of the Act, but have only urged that where a defendant is sued criminally, the court must determine whether the regulation is beyond the powers conferred upon the Department by Congress, citing 35 Harvard Law Review 952; *Panama Refining Co. v. Ryan*, 392 U. S. 388; as well as other cases.[7]

[7]It should be noted that even in the absence of a statutory provision such as Section 204(d), defendants would be barred from attacking the validity of the Regulations by the rule requiring the exhaustion of administrative remedies. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51 (1938); *Nick Falbo v. United States*, U. S. Supreme Court, decided January 3, 1944, 12 L. W. 4113 (prosecution for failure to report for induction, defendant may not question arbitrariness or validity of his classification); and *Bradley v. City of Richmond*, 227 U. S. 477, (1913).

Neither the case of *Panama v. Ryan* nor the law review article give consideration to statutory limitations such as Section 204(d) contains. This section expressly prevents such examination and this restriction has been fully upheld by Federal courts in numerous cases. See *Rottenberg v. United States,* 137 F. (2d) 850 (1 Cir., 1943), cert. granted Nov. 8, 1943; *Henderson v. Burd,* 133 F. (2d) 515 (2 Cir., 1942); *Brown v. Ayello,* 50 F. Supp. 391 (N. D. Calif., 1943); *U. S. v. Fitzsimmons Stores* (S. D. Calif., 1943), OPA Service 620:210; *U. S. v. C. Thomas Stores,* 49 F. Supp. 111 (D. C. Minn., 1943); *U. S. v. Krupnick,* 51 F. Supp. 982 (D. C. N. J., 1943); *U. S. v. Sosnowitz and Lotstein,* 50 F. Supp. 586 (D. C. Conn., 1943); Henderson v. Kimmel, 47 F. Supp. 635 (D. C. Kan., 1942); *Brown v. W. T. Grant* (D. C. N. Y., 1943), OPA Service 620:312; *Bowles v. Liniavski* (D. C. N. Y., 1943), OPA Service 620:308; *Brown v. Warner Holding Co.,* 50 F. Supp. 593 (D. C. Minn., 1943); and *U. S. v. Gregory* (D. C. Ky., 1943), OPA Service 620:266.

As we have shown, Section 204(d) withholds from this court jurisdiction to consider the challenge to the validity of these regulations to the effect that they must be approved by the War Food Administrator before their issuance, and that the failure to do so renders them invalid. Assuming, however, *arguendo*, that the court did have jurisdiction to consider such a challenge, the defendants are in error. The Emergency Price Control Act, as amended, provides for approval by the Secretary of Agriculture of all price ceilings placed upon *"agricultural commodities."* This authority has been transferred from the Secretary of Agriculture to the War Food Administrator

by Executive Order No. 9328, dated April 8, 1943.[8] However, the two regulations here involved do not cover "agricultural commodities," they only embrace *processed* meats.

Since the regulations cover commodities processed from agricultural commodities rather than the agricultural commodities themselves, and since Section 3 of the Act treats agricultural commodities and commodities processed from agricultural commodities separately (see particularly Section 3(c)), it is clear that the Act did not require approval by the Secretary of Agriculture. In the case of *U. S. v. Charney,* 50 F. Supp. 581 (D. C. Mass., 1943), the same argument was made in regard to an indictment based upon Revised Maximum Price Regulation No. 169. In rejecting the attack, the court said:

> "Section 3(e) of the Act requires the approval of the Secretary of Agriculture before any action is taken with respect to any 'agricultural commodities.' However, it would seem that a 'wholesale cut' is not an 'agricultural commodity' within the meaning of Section 3(e), but rather is a 'commodity processed from' and 'agricultural commodity' within the meaning of Section 3(c). If this is the correct construction, and I believe it is, it follows that the provisions of Section 3(e) is not applicable to 'wholesale cuts.' "

Therefore, apart from the effect to be given to Section 204(d) of the Act, defendants' argument is founded upon erroneous grounds.

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[8]However, Maximum Price Regulation Nos. 169 and 148 were both issued before the transfer of authority by Executive Order 9328 from the Secretary of Agriculture to the War Food Administrator.

II.

The Emergency Price Control Act of 1942 Does Not Unlawfully Delegate Authority to Control Prices to the Administrator.

Defendants Point II of their brief (p. 9) attack the Act as constituting an invalid delegation of legislative power to the Administrator to control prices. This attack being one directed at the constitutional validity of the basic Act as distinguished from an attack on the regulations is open for consideration by this court. (See p. 13, footnote 6, *supra.*) We turn, therefore, to the issues presented by the Congressional delegation of authority to the Administrator.

A precise formulation of the outer limits of lawful delegation has never been attempted by the Supreme Court and, in any event, is unnecessary to this case. The degree of detail with which Congress must describe its policies and standards, vary with the character of the subject of regulation. In determining what Congress "may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination." *Hampton & Co. v. United States,* 276 U. S. 394, 406 (1928). "In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it satisfies the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable." *(United States v. Rock Royal Co-op.,* 307 U. S. 533, 574 (1939).)

The instant case is safely within the permitted limitation The discretion of the Administrator is "not unconfined and vagrant."[9] Rather it is canalized by unusual specificity. For, as we shall show, Congress has carefully defined both the ends to be achieved by the Act and the means by which the Administrator is to achieve them.

1. *Statement of Policy.* Section 1(a) of the Act sets forth the statutory objectives. It is declared to be in the interest of national defense and necessary to the effective prosecution of the war that measures be taken for various essential purposes, including stabilization of prices, prevention of inflationary increase in prices and rents, prevention of war time profiteering and other disruptive practices resulting from war time scarcities, and protection of persons with fixed and limited incomes against undue impairment of living standards. The legislative policy so expressed is definite and clear. It plainly satisfies the requirements which have been prescribed by the Supreme Court. See *Opp Cotton Mills v. Administrator,* 312 U. S. 126 (1941) (F. L. S. A.); *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381 (1940) (Bituminous Coal Act); *United States v. Rock Royal Co-op,* 307 U. S. 533 (1939) (Milk Marketing Provisions and Agricultural Marketing Agreement Act); *Mulford v. Smith,* 307 U. S. 38 (1939) (Tobacco Market Quota Provisions of the Agricultural Adjustment Act).

2. *The Statutory Standards.* Sections 2(a), (c), (d), (g) and (h) of the Act set forth standards which govern the Administrator's exercise of his authority to control

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[9]Cardozo, J., Dissenting. *Panama Refining Co. v. Ryan,* 293 U. S. 388, 440 (1935).

prices. The standards mentioned are detailed and specific; they carefully circumscribe the Administrator's discretion, guiding him as to when he may act and how he may act.

The Administrator may promulgate price regulations when in his judgment "the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act" (Act, Section 2(a)). The Act does not leave the promulgation of price regulations to the Administrator's subjective and unconfined discretion. He must examine the pertinent data objectively to determine whether the promulgation of a regulation will effectuate the Act's purposes.[10] The grant of power, moreover, acquires meaning from the clearly stated objectives of the Act. *Cf. Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 165-166.

The Acts contain detailed standards governing the determination of maximum price levels. Not only must the prices fixed be "generally fair and equitable," and "effectuate the purposes of this Act" (Act, Section 2(a)), but in addition and going beyond the usual provisions

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[10]The requirement that the Administrator must exercise "judgment" as to whether this action would achieve the Act's purposes does not vitiate the conclusion that his discretion in determining whether to act is properly circumscribed. A provision of this nature is as necessary to sensible regulation as it is familiar. Thus in *United States v. Rock Royal Co-op*, 307 U. S. 533 (1930) the Court held lawful a delegation of authority to the Secretary of Agriculture which provided that he might initiate action whenever he "has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title" (7 U. S. C. 608c(3)). Similarity in *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163 (1919), the Court upheld the Joint Resolution of July 16, 1918, which authorized the President to take over the telephone system of the country "whenever he shall deem it necessary for the national security or defense * * * and to operate the same in such manner as may be needful or desirable" (40 Stat. 904). Plainly, the Act is not invalid simply because the Administrator is entitled to exercise his judgment, such an exercise is implicit in such standards as "public convenience and necessity," "public interest," "just and reasonable," and similar traditionally proper standards.

governing rate making, price fixing and wage determinations which contain the familiar requirements of fairness, equity, or reasonableness, there is here a statutory guide in terms of time, that is, in terms of prices actually prevailing as of a given period. The basic Act directs the Administrator to give consideration, so far as practicable, to prices prevailing between October 1 and October 15, 1941. By the amendatory Act (Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App. Supp. II, sec. 961 *et seq.*), stabilization of prices at the levels of September 15, 1942 is directed so far as practicable, a standard thus being provided for the guidance of the Administrator in holding fast against further price increases. It may be observed that the "dollars-and-cents" ceilings established by Revised Maximum Price Regulation No. 169 set prices at a level slightly higher than those prevailing between March 16 and March 28, 1942[11] and resulted in stabilization of beef prices on the basis of levels existing on September 15, 1942.[12]

The basic Act (Section 2(a)) also provides that adjustments in the determination of price levels take account of such relevant factors as the Administrator "may determine and deem to be of general applicability, including * * * Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits * * * during and subsequent to the year ended October 1, 1941."

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[11]See Statement of Considerations accompanying Revised Maximum Price Regulation No. 169, OPA Service 41:339. This document was filed with the Division of the Federal Register. Under Section 2.4(b) of the Federal Register Regulations, the Director has determined that filing constitutes compliance with the Federal Register Act (44 U. S. C., Sec. 301 *et seq.*) and has excluded statements of consideration from publication.

[12]*Id.*, OPA Service 41:341-C, 41:341-D.

Further, under Section 3 of the Act of October 2, the maximum price established for any commodity processed or manufactured in whole or in substantial part from any agricultural commodity must reflect to the producer of the commodity designated prices as set forth in two numbered clauses of the Section (Clauses 1 and 2 under Section 3). The provisions of the second clause may be waived upon a finding of necessity to correct gross inequities. Modifications must be made in maximum prices for agricultural commodities or products processed therefrom in any case where it appears that this is necessary to increase production of a commodity for war purposes, or where increased costs since January 1, 1941 are not reflected in maximum prices. Adequate weight must be given to farm labor in setting prices for both agricultural products and commodities processed therefrom.

Insofar as practicable, the Administrator must consult with industry representatives before issuing an order affecting them. Finally, the preservation of Congressional guardianship over the authority delegated is indicated by the requirement in Section 301 of the original Act that the Administrator make quarterly reports to Congress, by the provision of the Act limiting its duration to June 30, 1943 (Section 1(b)), and by the amendment thereto extending the life of the Act only to June 30, 1944 (Amendatory Act, Section 7(a)).

3. *Decisions under the Act.* The District Court in this case overruled defendants' demurrers to the indictment which attacked the Act as constituting an invalid delegation of legislative power to the Administrator to control prices. In so doing, the court below acted in accord with the unanimous court decisions on this point. Every court which has considered the validity of the dele-

gation of power granted to the Administrator to control prices has sustained that delegation.[13]

The Supreme Court of California in the case of *Miller v. The Municipal Court,* 142 P. (2d) 297 (Sept. 30, 1943), exhaustively considered and fully upheld the delegation of power to the Administrator to control prices. The court observed that:

> "To demand that Congress should impose upon this shifting and complex scheme the relatively permanent holds of statutory provisions, unqualified by a large degree of administrative discretion, would nullify the effective operation of government regulation and render it unworkable. * * * In view of this situation, the United States Supreme Court has reduced the constitutional question to a comparatively simple explanation: Congress must state, insofar as is reasonably practicable, considering the nature of the subject matter and the regulation sought, the purpose which it seeks to accomplish and the standards by which that purpose is to be effectuated. It may then constitutionally delegate to an administrative agency the powers to determine the details essential to carry out the legislative purpose (U. S. v. Rock Royal Co-op, *supra*); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (60 S. Ct. 907, 84 L. Ed. 1263); Opp Cotton Mills v. Administrator, *supra*)." (142 P. (2d) at 305).

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[13]This delegation of power has been sustained in the following cases: *Rottenberg v. United States,* 137 F. (2d) 850 (1 Cir., 1943); *cert. granted* November 8, 1943; *United States v. C. Thomas Stores,* 49 F. Supp. 111 (D. C. Minn. 1943); *Brown v. Ayello,* 50 F. Supp. 391 (N. D. Cal. 1943); *United States v. Fitzsimmons Stores* (S. D. Cal. 1943), OPA Service 620:210; *United States v. Krupnick,* 51 F. Supp. 982 (D. C. N. J. 1943); *United States v. Charney,* 50 F. Supp. 581 (D. C. Mass. 1942); *United States v. Sosnowitz,* 50 F. Supp. 586 (D. C. Conn. 1943); *United States v. Friedman,* 50 F. Supp. 584 (D. C. Conn. 1943); *Bowles v. Liniavski* (S. D. N. Y., decided December 13, 1943), OPA Service 620:308; *Miller v. Municipal Court,* 142 P. (2d) 297 (Supreme Court of California, Sept. 30, 1943), and *Brown v. W. T. Grant Co.* (S. D. N. Y., Dec. 14, 1943), OPA Service 620:312.

The court then quoted the provisions of Section 1(a) and 2 of the Act and in relation thereto stated:

> "These declared policies and standards are as specific as, or even more than, many of the standards upheld in previous decisions by the U. S. Supreme Court." (142 P. (2d) at 306, 307.)[14]
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> * * * * * * * * *
>
> "And insofar as the respondent objects to the action of Congress in allowing the Price Administrator to exercise certain powers when, in his judgment, a specified state of facts exists, the decision supports just such statutory provisions. For example, in Dakota Central Telephone Co. v. S. D., 280 U. S. 163, 181 (39 S. Ct. 507, 63 L. Ed. 910), the court held valid a joint resolution authorizing the President to take over the telephone system of the country 'whenever he shall deem it necessary for the national

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[14]The court then cited the following cases, and the applicable standards contained in the respective Acts: *"National Broadcasting Co. v. United States,* 316 U. S. 447 (62 S. Ct. 1214, 86 L. Ed. 1586); *Federal Radio Com. v. Nelson Bros. Co.,* 289 U. S. 266 (53 S. Ct. 627, 77 L. Ed. 1166, 89 A. L. R. 406) ("public convenience, interest, or necessity"); *New York Central Securities Corp. v. United States,* 287 U. S. 12 (53 S. Ct. 45, 77 L. Ed. 138) ("in the public interest"); *Chesapeake & Ohio Ry. Co. v. United States,* 283 U. S. 35 (51 S. Ct. 337, 75 L. Ed. 824), and *Colorado v. United States,* 271 U. S. 153 (46 S. Ct. 452, 70 L. Ed. 878) ("certificates of public convenience and necessity"); *Tagg Bros. & Moorhead v. United States,* 280 U. S. 420 (50 S. Ct. 220, 74 L. Ed. 524 ("just and reasonable" commissions) *United States v. Chemical Foundation,* 272 U. S. 1 (47 S. Ct. 1, 71 L. Ed. 131), ("in the public interest"); *Mahler v. Eby,* 264 U. S. 32 (44 S. Ct. 283, 68 L. Ed. 549) ("undesirable resident"); *Monongahela Bridge Co. v. United States,* 216 U. S. 177 (30 S. Ct. 356, 54 L. Ed. 435), and *Union Bridge Co. v. United States,* 204 U. S. 364 (27 S. Ct. 367, 51 L. Ed. 523) ("unreasonable obstruction to navigation"); *Buttfield v. Stranahan,* 192 U. S. 470 (24 S. Ct. 349, 48 L. Ed. 525) ("purity, quality, and fitness for consumption"); and see Cheadle, The Delegation of Legislative Functions, 27 Yale Law Jour. 892, 901."

> security or defense * * * and to operate * * * (it) in such manner as may be needful or desirable * * *.' Similarly, the Supreme Court approved a delegation of authority to the Secretary of War 'to do everything by him deemed necessary to suppress and prevent prostitution within such distances of army centers 'as he may deem needful.' McKinley v. U. S., 249 U. S. 397 (39 S. Ct. 324, 63 L. Ed. 668). And in U. S. v. Curtis Wright Export Corp., 299 U. S. 304 (57 S. Ct. 216, 81 L. Ed. 255), the court upheld Congressional delegation to the President of the power to prohibit the sale of arms to a country at war, upon his determination that such an embargo would 'contribute to the destruction of peace.' " (142 P. (2d) at 307.)

The court concluded that the Act clearly constituted a valid and constitutional delegation of legislative power. Statements contained in *Miller v. Municipal Court* are representative of similar statements contained in the cases in footnote 13, *supra*. This unanimous weight of judicial opinion and the principles of law upon which they are founded, are a conclusive answer to the contentions relied on by defendants in Point II of their brief.[15]

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[15]Defendants state that the Administrator is given the power to define and create crimes and offenses against the United States through the promulgation of a regulation (Defendants' Brief, p. 15). The violations by defendants in the present case are violations, not of the regulation, but of Section 4(a) of the Act. See *United States v. Hark*, U. S. Supreme Court, decided January 3, 1944; *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). See also *United States v. Krupnick*, 51 F. Supp. 982 (D. C. N. J., 1942).

III.

The District Court Did Not Err or Abuse Its Discretion in Refusing to Vacate the Judgments and Sentences and Permit the Appellants to Withdraw Their Pleas of Guilty and Re-enter Their Pleas of Not Guilty, and in Refusing a New Trial.

A.

The District Court Did Not Have Jurisdiction to Set Aside Appellants' Pleas of Guilty and Allow Them to Enter Pleas of Not Guilty.

The appellants entered their pleas of guilty on August 11, 1943 [R. 15], and judgments of the District Court sentencing the defendants were entered on August 30, 1943 [R. 17-19; 19-20]. On August 31, 1943, the appellants filed their motion to withdraw their pleas of guilty and enter pleas of not guilty [R. 63]. The motion was therefore not only made after the sentence had been imposed, but also more than 10 days after the entry of the plea of guilty. The motion was therefore not timely made, and the District Court had no jurisdiction to grant such motion. (Rule 2(4) of Rules of Practice and Procedure in Criminal Cases.)

In *Farnsworth v. Zerbst* (5 Cir.), 98 F. (2d) 541, 543, the court discusses Rule 2(4) as follows:

> "But it is further argued that an absolute right to withdraw the plea was established by the Act of Feb. 24, 1933, amended March 8, 1934, 28 U. S. C. A. §723a, authorizing the making of rules of procedure after conviction or pleas of guilty in criminal cases,

because of the proviso: 'Provided, that nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.' Accordingly Rule 2(4), 28 U. S. C. A. following section 723a, provides: 'A motion to withdraw plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.' We are of opinion that a plea of *nolo contendere* is a plea of guilty within the Act and the Rule, but *they do not give any right to withdraw such pleas. They deal only with a limit of time within which the application to withdraw may be filed.* The principles on which it may be granted or denied remain unchanged." (Emphasis added.)

In *Farrington v. King* (8 Cir.), 128 F. (2d) 785, 787, the court states:

"The contention that Judge Reeves improperly denied petitioner's motion to set aside the plea of *nolo contendere* and in some way obstructed petitioner's efforts to appeal from the denial of the motion is without basis and without any color of merit. The motion was addressed to the discretion of the court and the order denying it was not appealable. Benson v. United States, 9 Cir., 93 F. (2d) 749, 751. Moreover, the motion was made more than ten days after the entry of the plea and after sentence was imposed, and was therefore too late. Rule 2(4) of the Rules of Practice and Procedure in Criminal Cases, promulgated by the Supreme Court of the United States, as amended, 18 U. S. C. A. following §688."

In *Lima v. U. S.* (6 Cir.), 89 F. (2d) 1012, the court held that appellant's motion to change his plea from guilty to not guilty must be made within ten days after the entry of his plea of guilty.

In *United States v. Schor* (D. C. N. Y.), 13 F. Supp. 399, affirmed in 85 F. (2d) 1020 (2 Cir.), the court held that a motion to withdraw a plea of guilty must be made before the imposition of sentence.

In *Cooke v. Swope* (D. C. Wash.), 28 F. Supp. 492, 494, the court stated:

> "Strength is added to this conclusion by the fact that the rules of the Supreme Court governing criminal cases, which have the force of law, provide that, after a plea of guilty had been entered, the District Court, upon cause shown, may allow it to be changed within ten days after entry and before sentence. Rule II(4), 28 U. S. C. A. following Section 723a. *After that period, the District Court cannot allow a change of plea, and the government acquires the right to have judgment follow the plea.* The object of this rule was to do away with the rule previously obtaining which permitted a change of plea 'if for any reason the granting of the privilege seems fair and just,' Kerchavel v. United States, 1927, 274 U. S. 220, 225, 47 S. Ct. 582, 583, 71 L. Ed. 1009, and which no doubt, at times, worked for delay." (Emphasis added.)

In affirming the District Court this Honorable Court stated, in part, that "the facts are accurately stated and each point raised by appellant correctly treated (109 F. (2d) 955).

B.

The Facts of This Case Would Not Properly Support the Common Law Writ of Error Coram Nobis.

Counsel for appellant attempts to circumvent Rule 2(4) by arguing that the motion made on August 31st, was in effect a petition for the common law writ of error *coram nobis*. A consideration of this point, as well as the point as to abuse of discretion, requires a consideration of the facts presented to the District Court. While there is no substantial conflict in the facts except as to the point as to whether or not a portion of the report of the probation officer was read to counsel for appellants prior to sentence, because of certain phrases contained in appellants' brief which might be misleading,[16] a statement of facts from the government's point of view should be given.

The Facts.

After the information had been filed, a demurrer, motion to quash, and plea in abatement, were entered seeking to dismiss the information. Upon a hearing on August 2, 1944, the court overruled these motions [R. 14, 56], and defendants then entered a plea of not guilty [R. 14, 56]. At this time, Samuel Mirman, attorney for defendants, approached Ray H. Kinnison, Assistant United States

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[16]The portions of appellants' brief which the Government believes are misleading are: Page 2. "The understanding and arrangement was that defendants plead guilty to Counts One and Three of the Information and be fined $125.00 each on each of said counts * * *." Page 17. "Upon this assurance they consented * * * to withdraw their pleas of not guilty to Counts One and Three of the Information." Page 18. "Affiant would not have recommended a change of plea had he not been assured * * *." Page 18. "Inasmuch as sentence was summarily imposed in announced disregard of an existing agreement * * *." Page 21. "There is no question but that defendants in the case at bar relied upon the statements and arrangements made * * *." Page 23. All of the last paragraph wherein it is stated that there was an agreement between the parties as to the nature of the sentence.

Attorney, and Roger Johnson, attorney for the Office of Price Administration, for the purpose of changing defendants' pleas to "guilty" [R. 66, 73, 76]. Mr. Mirman indicated that defendants would be willing to plead guilty to two counts of the information if the remaining counts were dismissed [R. 73, 76]. No mention was made of what sentence would or should be imposed. John W. Preston, former judge of the Supreme Court of California, and former U. S. Attorney for California [R. 88], then became associated with Mr. Mirman as counsel for defendants.

After studying the case, and notwithstanding the fact that in his opinion "the proof against the defendants was very weak and defective" and the validity of the law and the regulations "as applied to these defendants was very doubtful," Judge Preston advised appellant "that it was advisable to negotiate with the office of the District Attorney, looking toward a plea of guilty on some of the counts of the Information and a dismissal of the remaining counts." [Aff. of John W. Preston, R. 66.] Judge Preston then contacted Mr. Kinnison and asked him if a plea of guilty on two counts with a dismissal of the other counts of the information would be acceptable [R. 76]. The following day Judge Preston called at Mr. Kinnison's office and made further inquiry [R. 66, 76, 83]. Mr. Kinnison agreed that a plea of guilty to two counts would suffice if the legal staff of the Office of Price Administration approved [R. 67, 77, 83]. Judge Preston then asked what fines had been imposed by the courts for offenses of this character [R. 67, 77, 83], and was told that a fine of $250.00 had been imposed by Judge Beaumont in a previous trial [R. 67, 77, 83].

Judge Preston then called upon the Office of Price Administration and talked to Mr. Roger Johnson, who informed Judge Preston that a plea of guilty on two counts would be satisfactory to the Office of Price Administration. Judge Preston then asked if any defendants had been sentenced to jail, and was told that none had been up to that time [R. 67, 74, 77].

Judge Preston then returned to see Mr. Kinnison on August 10 [R. 67, 77] and asked if he would recommend to the court a total fine of $500.00 [R. 67, 77]. In reply, Mr. Kinnison stated that the United States Attorney's office would not recommend to the courts what sentences or fine should be imposed [R. 77-8, 67, 84], but that he would discuss the matter with the probation officer [R. 78, 68].[17] Mr. Kinnison then talked to the probation officer [R. 78, 84] and informed that officer of Judge Preston's suggestion that a total fine of $500.00 appeared reasonable. The probation officer stated that if the facts were as outlined, and if defendants' record were clear, that officer would recommend a moderate fine to the court [R. 78]. Mr. Kinnison then called Judge Preston and related the substance of the conversation to him [R. 78].[18]

Prior to the entry of their plea of guilty Mr. Preston had discussed with the appellants the question of the sen-

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[17]Mr. Kinnison stated that no specific amount would be recommended by the United States Attorney's Office to the probation officer. [R. 78.] There is an inferential conflict between statements made by Judge Preston and Mr. Kinnison. Though Judge Preston did not say that a $500.00 fine in terms of dollars and cents had been recommended to the probation officer [R. 68, 84], his position apparently was that such specific recommendation had been made; this is, however, only a logical inference from his statements.

[18]There is again an inferential disagreement between the statements of Mr. Kinnison and Judge Preston, for the latter infers that Mr. Kinnison in reporting the attitude of the probation officer declared that a specific sum had been mentioned and had been accepted by the probation officer.

tence and told them of the nature of his discussion with the United States Attorney's office. Mr. Preston, in this conversation, advised appellants that he could not guarantee what the sentence would be, that the court was not bound to follow any recommendation made to it, and that the matter of the sentence was entirely up to the court. [Testimony of John W. Preston, R. 86-87.] With this in mind, the appellants on August 11, 1943, pleaded guilty to Counts I and III of the Information.

On the day of the hearing on the report of the Probation Officer, Judge Preston called Mr. Kinnison to determine what the Probation Officer had recommended to the court. Mr. Kinnison stated that he read the last two paragraphs of the report of the Probation Officer to Judge Preston [R. 79].[19] The latter denied the fact that the Probation Officer's report was read to him [R. 81, 69], but stated many times, both in affidavits and in testimony, that Mr. Kinnison told him that the Probation Officer had recommended "substantial" fines [R. 69, 81, 82, 85]. Judge Preston was also told that the Probation Officer's report did not bind the court [R. 79-80].

At the hearing on the report of the Probation Officer, the court fined defendant Aaron Rosensweig the sum of $1,000.00 and sentenced him to the county jail for 30 days [R. 61]. Abe Rosensweig was fined $1,000.00 and

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[19]The Probation Officer's report reads as follows:

"Investigation has shown that Aron Rosensweig and Abe Rosensweig were violating price ceilings according to a well planned scheme. Their invoices of maximum prices and checks received from buyers show similar amounts. However, they accepted further cash payments on the side. OPA investigation indicates that thousands of dollars overcharge was probably made by this method.

Recommendation

"Because of the clear past record of these defendants, penitentiary sentence is not recommended. *It is recommended that they be given a heavy fine and placed on probation.*" (Emphasis supplied.)

further sentence suspended for two years [R. 61]. Judge Preston objected to the imposition of the jail sentence [R. 62], and detailed his alleged understanding with the United States Attorney and the Probation Officer [R. 61]. Mr. Kinnison stated that there had been no commitment made by the United States Attorney's office [R. 62]. The court then declared that no agreement between the parties as to the recommendation to the court could bind the court [R. 62], and refused to modify its sentence [R. 62].

Defendants filed motions to withdraw their pleas of guilty, substitute pleas of not guilty, and for a new trial. Affidavits were filed by both plaintiff and defendants. At a hearing on defendants' motions, the opportunity was again afforded defendants to show if any fraud or duress had been practiced. Charles H. Carr, United States Attorney, stated to the court that if injusitce had been done the court should correct it, and that he would leave the problem to the sound discretion of the court [R. 100]. The court said, however, that there was no serious conflict in the affidavits except as to whether the report of the Probation Officer had been read by Mr. Kinnison to Judge Preston [R. 100]. But even in this posture of the facts, the court concluded there was no serious conflict, because Judge Preston had repeatedly stated that Mr. Kinnison had told him that the Probation Officer had recommended "substantial" fines [R. 101], and that therefore the only complaint defendant could possibly have was the exercise by the court of its undeniable right to enter judgment in accordance with the demand of the facts of the case [R. 102-3]. The court concluded that defendants had not been misled, and in a reasonable and proper exercise of its discretion, denied defendants' motions.

Argument.

Whether a motion of the type made in this case should be treated as in the nature of a writ of error *coram nobis* was decided by this court in the case of *Robinson v. Johnson,* 118 F. (2d) 998 (9th Cir., 1941), cert. den. 62 S. Ct. 177. The court there held that where the motion to the trial court is based upon facts "that properly would have been brought to the court's attention at common law by the writ of error *coram nobis,* such motion may be made after the expiration of the time fixed for such motions by Rule II, *supra.*" The correctness of this decision has been questioned by this court in the subsequent case of *Crockett v. United States,* 125 F. (2d) 547 (9th Cir. 1942, cert. den. 316 U. S. 701). Since it is our position that the facts in this case would not justify the issuance of a writ of error *coram nobis,* the questionable precedent established by the *Robinson* case is therefore inapplicable.

See also:

Kelly v. United States, 9 Cir., 138 F. (2d) 489;

Young v. United States, 5 Cir., 138 F. (2d) 838;

Meredith v. United States, 6 Cir., 138 F. (2d) 772;

Strong v. United States, 5 Cir., 53 F. (2d) 820.

The California Supreme Court has defined the office of this writ in the following words:

> "The uniform conclusion of the decisions is that the function of a writ of error *coram nobis* is to correct an error of fact. It never issues to correct an error of law nor, so far as we have been able to ascertain, has it ever issued to redress an irregularity occurring at the trial, such as misconduct of the jury,

or of the court, or of any officer of the court (except under circumstances amounting to extrinsic fraud, which in effect deprived the petitioner of a trial upon the merits). * * *

"It appears that in each case where the writ of error *coram nobis* has issued to vacate a judgment, it has been upon the ground that such judgment was predicated upon the assumed existence of a fact or a condition which did not in truth exist, and the non-existence of which would have prevented the rendition of the judgment if it had been known."

People v. Reid, 195 Cal. 249, 254, 255; 232 Pac. 457, 461; 36 A. L. R. 1435.

"The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions, but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which without fault or negligence of the party, was not presented to the court. I Freeman on Judgments, §94."

People v. Mooney, 178 Cal. 525, 528; 174 Pac. 325, 326.

This Honorable Court, in *Robinson v. Johnston, supra,* at page 1001, states the rule as follows:

"The general rule in regard to the writ of error *coram nobis* is that its purpose is to bring to the attention of the court some fact which was unknown to the court which, if known, would have resulted in a different judgment."

Conceding for the purpose of argument only that the United States Attorney had agreed to recommend a fine of $125.00 for each defendant, such an agreement would certainly not have "prevented the rendition of the judgment" imposed by the District Court. (*People v. Reid, supra.*) It is the function and the duty of the Court to exercise its own judgment and discretion, free from any commitments or agreements made by counsel. The District Court did use its own judgment and discretion in this case, free from any recommendation made, as evidenced by the Court's own statement.

> "As far as making a recommendation is concerned, the Probation Officer did make a recommendation. The only break in the whole proceeding is that the Court exercised its own independent judgment. That seems to have been the trouble in this case." [R. 102.]

It should be noted that the trial court did not specifically decide whether this motion was properly one in the nature of writ of error *coram nobis* when the question was presented to it, but stated that it would decide the motion on the merits of the case [R. 61]. However, it is clear that on the facts of this case the motions were not in the nature of a writ of error *coram nobis,* and therefore, were improper.

The facts of this case reveal no fraud, duress, or other extrinsic grounds for which a writ of error *coram nobis* would lie at common law. The court found that there had been no misunderstanding which deprived defendants of any legal rights. Defendants were represented by able counsel, one of whom, Judge Preston, had been both a United States Attorney and a Judge of the Supreme Court

of California. The court further found that the only surprise to which defendants could point, was the failure of the court, in the exercise of its admitted discretion, to follow the Probation Officer's recommendation. In such a situation, a writ of error *coram nobis* will not lie.

Furthermore, defendants were given full opportunity to present and did present the basic facts relied on by them to show an agreement between the United States Attorney, the Probation Officer and the defendants as to the amount of the fine to be imposed. Defendants presented the essential facts of this agreement to the court at the time sentence was imposed, but the court refused to modify the sentence, stating that no agreement made by any of the parties involved could be binding upon the court. Since a writ of error *coram nobis* is applicable only to show facts which were unknown to the courts at the time of entry of judgment and sentence and which if known would have resulted in a different judgment and sentence (*Robinson v. Johnston,* 118 F. (2d) 547 (9th Cir., 1941), and since the basic facts were made known to the court at the time of judgment and sentence, a writ of error *coram nobis* will not lie. *Cf. Crockett v. United States,* 125 F. (2d) 547 (9th Cir., 1942).

For these reasons, defendants' motions were not in the nature of a writ of error *coram nobis.* Since the motions were filed after sentence, and therefore failed to comply with Rule II(4), defendants' motions came too late and were improper. See *Farrington v. King,* 128 F. (2d) 785 (8th Cir., 1942); *Cooke v. Swope,* 28 F. Supp. 492 (W. D. Wash., 1939); *United States v. Shor,* 13 F. Supp. 399 (E. D. N. Y., 1936); and *United States v. Bayaud,* 23 Fed. 721 (S. D. N. Y., 1883).

C.

The Court Did Not Abuse Its Discretion in Denying Defendants' Motions to Withdraw Their Pleas of Guilty, Substitute Their Pleas of Not Guilty, and for a New Trial.

The court, upon consideration of affidavits filed by plaintiff and defendants, and after a full presentation of arguments relied on by defendants to sustain their motions, denied these motions. In so doing, the court acted well within the realm of discretion conferred upon it, which this court should not disturb. See, *e. g., Fogus v. United States,* 34 F. (2d) 97 (4th Cir., 1929); and *Crockett v. United States,* 125 F. (2d) 547 (9th Cir., 1942), cert. den. 316 U. S. 701. There are more than ample facts to sustain the action of the trial court.

As the trial court stated [R. 100, 101], there was no serious conflict as to the agreements upon which defendants claimed they had been misled. Defendants' attorney, Judge Preston, according to his affidavit, declared that he had been informed that a total fine of $500.00 had been recommended by Mr. Kinnison to the Probation Officer. The Probation Officer stated, after talking with Mr. Kinnison, that if the facts were true as presented to him, a moderate fine would be recommended to the court. In substance these two statements are not conflicting, and certainly did not work to any disadvantage to the defendants. Judge Preston stated in his affidavit and testified that upon calling up Mr. Kinnison the morning of the hearing, Mr. Kinnison related the contents of the Probation Officer's report, and stated that this report had recommended a "substantial" fine. Mr. Kinnison, on the other hand, averred that he had read the last two paragraphs of the report over the telephone to Judge Preston.

The report, as a matter of fact, recommended the imposition of a heavy fine with no imprisonment due to the previous clear record of the defendant. Thus, Judge Preston knew that the report did not recommend a prison sentence, but recommended substantial or heavy fines. It is indeed difficult to understand how defendant can argue that he was misled by the statements made by Mr. Kinnison even in the light of Judge Preston's own testimony.

Apart from this, it was brought out in the testimony and in the affidavit filed by Mr. Kinnison that Judge Preston had been informed that an agreement between the Probation Officer, the United States Attorney, and the defendants to recommend certain fines to be imposed on defendants, would not be binding upon the court. Judge Preston further testified that he was entirely aware of this fact, and that he had advised his clients of this rule. In this respect, Judge Preston testified as follows:

> "The Court: What I am getting at, Judge, is that you reported your discussion with the United States Attorney's office and made the recommendation, and you most certainly advised your clients that you couldn't guarantee any such result? A. No, I couldn't guarantee the result.
>
> The Court: I mean, you didn't so advise them? A. I did not. I told them I thought the recommendation of the Probation Officer would be accepted, in all likelihood *in toto*, but that, of course, nothing could be guaranteed about that.
>
> The Court: Didn't you advise your clients, Judge, that any proposed arrangement with the United States Attorney would be subject to the will of the Court and the conscience of the Court? A. I think that was understood, so that there was no use commenting on that subject. There is a liaison between

the United States Attorney and the Federal Court, and the defendants have a right to rely on assurances made by the United States Attorney's office.

Q. Mr. Carr: You did so advise your clients, however, that it would be subject to the conscience of the Court? A. Well, that may have been, in substance, what I told them, that I thought the law hadn't been passed on, and it was doubtful whether it was valid or not, and that no Court would impose any imprisonment sentences under conditions like that, in my opinion * * *." [R. 87.]

In this posture of the case, it is difficult to understand how defendants could have been misled. As the District Court stated. "It would almost be beyond comprehension that a man of Judge Preston's ability and experience and understanding would be misled or his clients would be misled." [R. 103.]

As the trial court concluded, defendants' basic complaint is simply that the court did not follow the recommendations contained in the Probation Officer's report. But it is well established law that the imposition of a sentence or a fine greater than that recommended does not constitute reversible error. As the court said in *People v. Manriques,* 188 Cal. 602, 206 Pac. 63 (1922): "The fact that a defendant, knowing his rights and the consequences of his act, hoped or was led by his counsel, or others, to hope or believe that he would receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn."

United States v. Fox, 130 F. (2d) 56 (3 Cir., 1942), involved a motion by a defendant to set aside a plea of guilty to a charge of conspiracy. The court after observing that the accused was represented by able counsel, said:

> "The appellant does not claim that the agreement originally made or the subsequent recommendation of the Attorney General binds the trial court as a matter of law. The argument is rather that the facts as presented should have moved the trial court to grant the petition as a matter of discretion.
>
> * * * * * * * * *
>
> "With full knowledge of the facts and possible legal consequences he took, under careful legal advice, a course of action. He kept his agreement; the prosecuting officers kept theirs, but the judge who had the responsibility for determining the question did not choose to follow the recommendation made. The discretion so to act was for him to exercise * * *." (130 F. (2d) at p. 59.)

In *People v. Schwartz,* from which counsel for appellants quote, also contains the following pertinent language:

> "The case of People v. Miller, 114 Cal. 10, 16, 45 P. 986, 987, it is said, supports the action of the trial court, but it is not in the same category with the case before us as to the facts thereof. There the defendant was led by the advice of his counsel to believe that he would get less punishment if he changed his plea to guilty than he would receive if he stood trial and was convicted. In this hope, however, he was disappointed. The court rightly held that with full knowledge of the consequences

which might follow he should not be permitted to speculate upon the action of the court."

People v. Schwartz, 201 Cal. 309, 315; 257 Pac. 71, 73.

To the same effect. see also:

People v. Gottlieb, 25 Cal. App. (2d) 411; 77 P. (2d) 489;

People v. Sciunzi, 140 Cal. App. 70; 34 P. (2d) 1044;

People v. Michaels, 124 Cal. App. 41; 12 P. (2d) 137;

24 *C. J. S.,* p. 140, notes 43 and 44.

Another point of interest is that the appellants do not deny the commission of the acts charged in the information. In appellants' own affidavits there is not the slightest indication of such denial. The most that the appellants say is that their counsel advise them "that the evidence of the Government is weak and defective," and "that there was grave doubt as to the validity of the law and of the regulations under it." [R. 71.] In his affidavit Judge Preston makes substantially the same statement [R. 66]. Judge Preston also testified that he advised his clients: "You have got a 50-50 chance to beat this case." [R. 86.] These are certainly not denials of the commission of the acts charged. On the other hand, in his statement to the court prior to sentence, Judge Preston admitted that the appellants had committed the acts charged when he stated: "The act they committed, Your Honor, was one, not of moral turpitude, but one of self preservation" [R. 58], and, "I trust Your Honor will be lenient with them, and I pledge you they will not disobey these rules any more." [R. 59.]

This point is mentioned because it throws additional light on the attitude of the appellants. If the appellants had taken the position that they had not committed the acts charged, but had pleaded guilty on the assurance of a small fine rather than to go to trial, an entirely different situation would be presented. But the appellants admitted the commission of the acts charged, and speculated on the amount of the sentence. (*People v. Schwartz, supra.*)

An examination of the affidavits and testimony make it apparent that the trial court reasonably exercised its discretion in denying defendants' motions. Defendants were represented by able and experienced counsel and were not misled to their disadvantage by any statements made by the United States Attorney's office. Defendants were advised and were well aware that the court had the right and the power to exercise its own judgment as to the punishment which would be meted out, and having pleaded guilty with full knowledge of the legal consequences such a plea entails and not having denied the commission of the acts alleged in the information, may not complain that they should be relieved from the legal consequences of their plea. It is respectfully submitted that the trial court acted well within the bounds of judicial discretion.

Conclusion.

For the reasons stated, the judgments below should be affirmed.

Respectfully submitted,

CHARLES H. CARR,
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JAMES M. CARTER,
RAY H. KINNISON,
Assistant United States Attorneys.

APPENDIX.

Emergency Price Control Act.

Title I—General Provisions and Authority.

Purposes; Time Limit; Applicability.

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producer, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production

Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

Prices, Rents, and Market and Renting Practices.

Sec. 2 (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in

profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, with-

out regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provision of this subsection. * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent

to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act. * * *

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

Prohibitions.

Sec. 4 (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.

TITLE II—ADMINISTRATION AND ENFORCEMENT.

Administration.

Sec. 201 (d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

Procedure.

Sec. 203 (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and

other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

Review.

Sec. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order,

or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence, which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition

becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C. 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Enforcement.

Sec. 205(b) Any person who wilfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or

filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205(f)(2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

Title III—Miscellaneous.

Quarterly Report.

Sec. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

Definitions.

Sec. 302 (a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity:

Provided, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services. * * *

(i) The term "maximum price," as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

Application of Existing Law.

Sec. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

INFLATION CONTROL ACT OF 1942 (NEW).

56 Stat. 765, 50 U. S. C. App. Supp. II

Sec. 961, *et seq.* 961, through 971.

§961. Stabilization by President of prices, wages, and salaries affecting cost of living; public utility rate increase.

"In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided,* That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President ,or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase. Oct. 2, 1942, c. 578, §1, 56 Stat.—

§962. Regulations; delegation of authority, suspension of certain provisions of Emergency Price Control Act of 1942.

"The President may, from time to time, promulgate such regulations as may be necessary and proper to carry

out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3(a) and 3(c), and clause (1) of section 302(c), of the Emergency Price Control Act of 1942 (Sections 903(a), 903(c), and 942(c)(1) of this Appendix) to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act, suspend any other law or part thereof. Oct. 2, 1942, c. 578, §2, 56 Stat.—

§963. Maximum prices for agricultural commodities and products.

"No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture.—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3(b) of the Emergency Price Control Act of 1942 (section 903(b) of this Appendix), such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, of, if the market for such commodity was

inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided,* That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities, but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further,* That modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part, from any agricultural commodity, under regulations to be prescribed by the President in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum price so established will not reflect such increased costs; *Provided further,* That in the fixing of maximum prices on products resulting from the processing of agricultural com-

modities, including livestock, a generally fair and equitable margin shall be allowed for such processing; *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor. Oct. 2, 1942, c. 578, §3, 56 Stat.—

§964. Wages and Salaries; limitations on control.

"No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended (Title 5, §616; Title 29, §201 *et seq.*), or the National Labor Relations Act (Title 29, §151 *et seq.*), or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942; *Provided,* That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war. Oct. 2, 1942, c. 578, §4, 56 Stat.—

§965. Same; prohibition of violation of regulations; employer's reduction of salaries over $5,000; regulation of payment of double time.

"(a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive depart-

ments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of $5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week. Oct. 2, 1942, c. 578, §5, 56 Stat.—

§966. Termination of Act.

"The provisions of this Act (except sections 8 and 9) (sections 968 and 969 of this Appendix, and amendments to Title 15, §713a-8), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe. Oct. 2, 1942, c. 578, §6, 56 Stat.—

§967. Emergency Price Control Act of 1942, amendment; applicability of, and construction with, this Act.

"(a) Section 1-(b) of the Emergency Price Control Act of 1942 (section 901(b) of this Appendix) is hereby amended by striking out 'June 30, 1943,' and substituting 'June 30, 1944.'

(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 (section 901 *et seq.* of this Appendix) which are applicable with respect to orders or regulations under such Act shall,

in so far as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purpose with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

(c) Nothing in this Act shall be construed to invalidate any provisions of the Emergency Price Control Act of 1942 (section 901 *et seq.* of this Appendix) (except to the extent that such provisions are suspended under authority of section 2 (section 962 of this Appendix)), or to invalidate any regulation, price schedule, or order issued or effective under such Act. Oct. 2, 1942, c. 578, §7, 56 Stat.—

§968. Crop loans.

"(a) The Commodity Credit Corporation is authorized and directed to make available upon any crop of the commodities cotton, corn, wheat, rice, tobacco, and peanuts harvested after December 31, 1941, and before the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, if producers have not disapproved marketing quotas for such commodity for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:

(1) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 90 per centum of the parity price for the commodity as of the beginning of the marketing year;

(2) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (1) above;

(3) To noncorporators (except noncooperators outside the commercial corn-producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (1) above and only on so much of the commodity as would be subject to penalty if marketed.

(b) All provisions of law applicable with respect to loans under the Agricultural Adjustment Act of 1938, as amended (Title 7, §§612c, 1281 *et seq.*; Title 15, §§713c, 713c-1; Title 16, §§590h, 590c), shall, in so far as they are not inconsistent with the provisions of this section, be applicable with respect to loans made under this section.

(c) In the case of any commodity with respect to which loans may be made at the rate provided in paragraph (1) of subsection (a), the President may fix the loan rate at any rate not less than the loan rate otherwise provided by law if he determines that the loan rate so fixed is necessary to prevent an increase in the cost of feed for livestock and poultry and to aid in the effective prosecution of the war. Oct. 2, 1942, c. 578, §8, 56 Stat.—

§969. Amendment of provision relating to encouragement of production of non-basic agricultural commodities.

"(A) Section 4(a) of the Act entitled 'An Act to extend the life and increase the credit resources of the Com-

modity Credit Corporation, and for other purposes' approved July 1, 1941 (U. S. C. 1940 edition, Supp. I, title 15, sec. 713a-8), as amended—

(1) By inserting after the words 'so as to support' a comma and the following: 'during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated.'

(2) By striking out '85 per centum' and inserting in lieu thereof '90 per centum.'

(3) By inserting after word 'tobacco' a comma and the word 'peanuts.'

(b) The amendments made by this section shall, irrespective of whether or not there is any further public announcement under such section 4(a), (Title 15, §713-8(a)), be applicable with respect to any commodity with respect to which a public announcement has heretofore been made under such section 4(a) (Title 15, §713-8(a), Oct. 2, 1942, c. 578, §9, 56 Stat.—

§970. Definition of wages and salaries.

"When used in this Act, the term 'wages' and 'salaries' shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the Presi-

dent); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees. Oct. 2, 1942, c. 578, §10, 56 Stat.—

§971. Violations; penalties.

"Any individual, corporation, partnership, or association wilfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment. Oct. 2, 1942, c. 578, §11. 56 Stat.—"